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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 52.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

Statement.

This case comes by appeal from a final judgment of the Court of Claims dismissing a petition filed by the Missouri, Kansas & Texas Railway Company seeking to recover nine thousand four hundred and twenty-nine dollars and ninety-two cents ($9,429.92) claimed to have been erroneously withheld from the company's pay for transporting the mails.

The facts found by the Court of Claims, stated briefly, are as follows:

January 20, 1906, appellant, in connection with the St. Louis & San Francisco Railroad Company, established a fast-mail train running from St. Louis, Missouri, to Denison, Texas, and agreed to maintain said train service until June 30, 1910, which was done.

The quadrennial service and pay of appellant, under the contract of 1906, terminated June 30, 1910, and in February, 1910, anticipating a contract for service from June 30, 1910, to July 1, 1914, the company executed and filed its distance circular, wherein

> "the company named below agrees to accept and per-
> "form mail service upon the conditions prescribed by
> "law and the regulations of the department applicable
> "to railroad mail service."

The mails were duly weighed and in September, 1910, the Postmaster General notified the company that its pay from July 1, 1910, to June 30, 1914, had been fixed at certain sums on its several mail routes, and that

> "this adjustment is subject to future orders and to
> "fines and deductions and is based on a service of not
> "less than six round trips per week."

There was no agreement that the company should maintain its fast-mail schedule beyond June 30, 1910.

After repeated recommendations by the Postmaster General, Congress, on August 24, 1912, two years after the above-stated orders fixing pay on these routes, passed an act which provided:

> "SEC. 4. When, after a weighing of the mails for the purpose of readjusting the compensation for their transportation on a railroad route, mails are diverted therefrom or thereto, the Postmaster General may, in his discretion, ascertain the effect of such diversion by a weighing of such mails for such number of successive working days as he may determine, and have the weights stated and verified to him as in other

cases, and readjust the compensation on the routes affected accordingly: *Provided,* That no readjustment shall be made unless the diverted mails equal at least ten per centum of the average daily weight on any of the routes affected: *Provided, further,* That readjustments made hereunder shall not take effect before July 1, 1912, and shall be for divisions occurring after January 1, 1912."

In January, 1912, appellant practically withdrew its fast-mail train by changing its schedule so as to break connections at Vinita, Indian Territory, and on November 22, 1912, the Postmaster General issued orders to weigh for a period of 21 days such mail only as could be identified as being diverted from appellant's routes by reason of such change of service.

March 1, 1913, the Postmaster General issued orders readjusting the pay on these routes *from July 1, 1912,* basing the new pay upon a daily average weight of mails ascertained by deducting from the average found by the February, 1910, weighings the amount of diverted mail found by the weighing in November, 1912.

Appellant claimed that the normal increase between 1910 and 1912 in weight of mails carried should be taken into consideration; that the diverted mail had increased in weight between January, 1912, when diverted, and November, 1912, when weighed, and that the Postmaster General could not correctly certify to a diversion of at least 10 per centum unless he took these facts into consideration.

Being denied relief by the Postmaster General, suit was instituted in the Court of Claims, which court dismissed the petition without opinion.

Errors of Law Are Assigned.

I.

The contract being executed and in full force in 1910 for a period of four years, the diversion of mails having occurred in January, 1912, it was error to hold that an act passed subsequently and in August, 1912, could be made retroactive and apply to this case.

II.

The act of August 24, 1912, only authorized the Postmaster General to act when the diverted mails equalled at least 10 per centum of the average daily weight on any of the routes affected, and it was error to sustain his exercise of power in weighing mails in November, 1912, to ascertain weights diverted in January, 1912.

III.

The act of August 24, 1912, only conferred power on the Postmaster General to readjust pay when the diverted mails equalled at least 10 per centum of the average daily weight and it was error in sustaining his action in applying a weight of diverted mails taken in November, 1912, to a daily average taken in February, 1910, which daily average had immensely increased between said dates.

IV.

It was error for any cause to have dismissed the petition.

ARGUMENT.

I.

The contract being executed and in full force in 1910 for a period of four years, the diversion of mails having occurred in January, 1912, it was error to hold that an act passed subsequently and in August, 1912, could be made retroactive and apply to this case.

There can be no question that the relation between the carriers and the United States was a contractual relation.

It is provided by the Revised Statutes as follows:

> "SEC. 3942. The Postmaster General may enter into contracts for carrying the mail with railway companies, without advertising for bids therefor."
>
> "SEC. 3956. No contract for carrying the mail shall be made for a longer term than four years, and no contract for carrying the mail on the sea shall be made for a longer term than two years."

The statutes clearly contemplate that railway mail service shall be rendered by contract.

The Postmaster General invited the railroad to offer service by sending it the Distance Circular. By signing and filing the circular the road agreed to perform the service and stated its terms. The terms of the contract were then fixed. It was consummated by the act of the Postmaster General in offering the mails for transportation and accepting the service. His subsequent act in giving notice of the rate of compensation was purely ministerial, as the elements of that rate were all previously known; the average daily weight fixed by the weighing begun in February, the mileage fixed by the Distance Circular, and the method of compensation and the rate per annum fixed by statute (Act of March 3,

1873, 17 Stat., 558; Act of March 3, 1905, 33 Stat., 1082, and Act of March 2, 1907).

But, regardless of whether the contract is finally consummated by the act of the Postmaster General in putting mail on the trains after receiving the Distance Circular, "or by the act of the railroad in carrying mail after receiving the notice of compensation, it is the fact that the railroad's contract is evidenced and expressed by the Distance Circular."

The term of the contract is four years, and all the other conditions are expressed in the agreement

> "to accept and perform mail service upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service."

The provision of the order adjusting compensation, that it is "subject to future orders," means, of course, future orders consonant with the law and regulations.

That it was entering into a formal expressed contract in accordance with the terms of the Distance Circular for a four-year period is clearly expressed in the letter of the Post Office Department, by the Second Assistant Postmaster General, to Mr. G. M. Lindsay, Mail Traffic Manager of the Missouri, Kansas & Texas, dated June 30, 1910 (Report P. O. Dept.). The railroad had accompanied its Distance Circular with certain protests. The Department wrote in part:

> "This office is in receipt of the distance circular for Route No. 153,010, from Kansas City, Mo., to Denison, Texas, filed by you for the term beginning July 1, 1910, and ending June 30, 1914, for railroad mail service by your company. In regard to this I have to advise you that the Department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law or regulation and it must be understood that in the performance of service, from the beginning of the contract term named and during the con-

> tinuance of such performance of service your company will be subject as in the past to all the postal laws and regulations which are now or may become applicable during the term to this service."

This is a clear recognition that the act to be effected by the filing of the Distance Circular was the expression of the terms of a four-year contract.

The courts have not hesitated to confirm the view that the mail is carried by railroads under an express contract for four years. For example, in the case of Atchison, Topeka & Santa Fe Railway *vs.* United States, 225 U. S., 640, the court said (p. 640):

> "The Atchison, Topeka & Santa Fe Railroad had a four-year contract with the Post Office Department to carry the mail between Chicago and Kansas City. * * *
>
> "This contract was to expire June 30, 1907, by limitation, and with a view of obtaining data and proposing terms for a new arrangement to begin July 1, 1907, the postal authorities in February mailed to the company a 'Distance Circular' which, among other things, stated that the company was to accept and perform mail service under the conditions prescribed by law and the regulations of the Department? The form was filled out and signed by an agent of the company. He, however, noted exceptions to certain postal orders previously promulgated and 'future regulations which, in the company's opinion, might be unjust or unfairly reduce its compensation for services.' The circular with these objections was not received by the Department until July 24th, but the company in the meantime, and without any express contract, continued to carry the mails and to furnish the three car lines."

There is here a definite expression that the railroad carried mail under a four-year contract prior to 1907, and that the purpose of the Distance Circular was to express the terms

of another express contract for the succeeding four-year period.

A more direct statement is found in Union Pacific Railroad Co. *vs.* United States, 219 Fed., 427. Here the Circuit Court of Appeals (Eighth Circuit), said:

> "The legal relation existence between the United States and the railroad company was contractual. The company agreed, in consideration of the payment of a stipulated sum for the service that it would 'accept and perform the service upon the conditions prescribed by law and the regulations of the Department.' This language in express terms made all applicable provisions of law and regulations a part of the contract."

The most recent judicial expression on the relation of railway mail carriers to the Government is in Great Northern Railway Co. *vs.* United States, 236 Fed., 433. Here again the Circuit Court of Appeals for the Eighth Circuit speaks as follows:

> "These contracts were for four years and were expressly authorized by law. They were therefore valid and binding on the United States, as well as upon the railroad company, for that length of time. They contained within themselves a mode for lessening, or if deemed best, for discontinuing entirely the described service, and provided for a proportionate reduction of the stipulated compensation. In no other mode could the contract be changed, except by the mutual assent of the parties. Any change attempted by either, otherwise, would have been merely a breach of the agreement, and the United States would have been liable to damages for its breach in the same manner and to the same extent as a private party, for which a suitable remedy was provided by law in the jurisdiction conferred upon the Court of Claims. C. & N. W. Ry. Co. *vs.* United States, 104 U. S., 680; 26 L. Ed., 891.
>
> "Contractual relation is established by the distance

> circular and its acceptance, and is uniformly assumed and recognized by the courts. Where the service is performed under such distance circular and acceptance, it is performed under a contract between the Government and the company doing the service. United States *ex.* Atlantic Coast Line R. R. Co. (C. C.), 189 Fed., 779. * * *
>
> "Instances might be multiplied where different courts have recognized the contractual relation between the Government and its mail carriers, and we are therefore of the opinion that a distance circular and its acceptance constitute a contract for a separate and distinct term of four years."

The Government hereby clearly entered into a contract with claimants to carry the mail for four years on "the conditions prescribed by law."

The exact terms of the contract are then found in the law existing when the contract was made. The railroad contracted to carry the mail for four years under those laws.

> "The same principles of right and justice which prevail between individuals should control in the construction and carrying out of contracts between the Government and individuals" (United States *ex.* Stage Co., 199 U. S., 414, at p. 423).

No principle of contract law is more firmly established than that the terms must be definite and that the minds of the parties must meet.

The terms of the present contract were expressed in the statute, and no statutes other than those in effect at the time of making of the contract could constitute definite terms.

Nor could the minds of the parties meet on statutes not in being as part of the terms of the contract.

Since the act of March 3, 1873, the basis of adjustment for railway mail pay has been fixed by law as

> "* * * the average weight to be ascertained in every case, by the actual weighing of the mails for

> such a number of successive working days, not less than thirty, at such times after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

By the act of March 3, 1905 (33 Stat., 1082, 1088), this provision was re-enacted, increasing the minimum weighing period to ninety successive working days as follows:

> "That hereafter before making the readjustment of pay for transportation of mails on railroad routes the average weight shall be ascertained by the actual weighing of the mails for such number of successive working days, not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

It was thus provided that railway mail pay might be readjusted at any time by the Postmaster General on the basis of weight as ascertained by an actual weighing of the mails on the route for the statutory period. This statutory provision was written into claimant's contract by its agreement set out in the Distance Circular. By this contract the basis of readjustment of pay was fixed until June 30, 1914, and during that period the pay could be readjusted on no other basis without violating the contract.

This legal conclusion is thoroughly consonant with the provision of the notice of pay adjustment that it is "subject to future orders." Such future orders are, of course, orders made in compliance with the law which expresses the contract. The claimant here has at no time claimed that it was improper for the Postmaster General to readjust its pay because of diversion of mails to or from its lines; it claims that the Postmaster General failed to readjust its pay upon the only basis he could under its contract legally em-

ploy, namely, an average daily weight ascertained by an actual weighing of all the mails on the route for the statutory period.

If there were any doubt of this limit to the Postmaster General's power of readjustment it was resolved by the Supreme Court in Chicago, Milwaukee & St. Paul Railway Co. *vs.* United States, 198 U. S., 385. Here, after quoting section 4002, Revised Statutes, embodying the provision of the act of 1873 for readjusting pay on the basis of average weight and providing the method of ascertaining the average daily weight by actual weighing for the statutory period, the court says:

> "The Postmaster General is given the power to arrange the railway routes upon which the mail is to be carried, and to adjust and readjust compensation. The orders of December 1 and December 3, respectively, reserved this power, and the only limitation on its exercise expressed in section 4002 is as to the manner of ascertaining the rate, which is to be by the average weight of the mails."

Whatever power, then, the Postmaster General has to readjust compensation and whatever discretion he may have as to rate, the readjustment must be on the basis of average daily weight, and that weight must be ascertained by actual weighing of the mails for ninety days. This was part of the contract claimant had with the United States.

Let us see how completely the Postmaster General disregarded this obligation. The mails on claimant's route having been weighed for the four-year term in the spring of 1910, and compensation having been adjusted in the fall of 1910, diversions having been made to and from claimant's routes in the spring of 1912, the claimant was notified by letter of November 27, 1912, that a twenty-one days' weighing would be had beginning November 26, 1912, of

> "such part of the mails diverted to other lines at St. Louis from the St. Louis & San Francisco and

> Missouri and Texas lines, following the discontinuance of the Frisco, Missouri, Kansas and Texas fast mail train between St. Louis, Missouri, and Denison, Texas, in January and April, 1912, that may be definitely identified." (See Report P. O. Dept.)

On November 29, claimant's mail traffic manager inquired when weighing would be begun on their lines (Report P. O. Dept.). By letter of December 5, the Department advised claimant that

> "it has been found practicable to weigh all the mail either at St. Louis or on the Iron Mountain and Missouri Pacific trains. It is therefore unnecessary to weigh any mails on the trains of your company" (Report P. O. Dept.).

The claimant thereupon protested against such procedure (Dec. 12, 1912).

On February 21, 1913, the Post Office Department notified claimant that from July 1, 1912, compensation would be readjusted on routes 153,010, 153,016, 155,098, 150,028, 150,100 (Report of P. O. Dept.).

Claimant at once entered protest under date of February 26 (Report P. O. Dept.).

By date of March 6, the Department notified claimant of a readjustment on route 150,128 (Report P. O. Dept.).

Under date of March 25, both claimants notified the Department that all warrants for pay under readjusted rates were received under protest.

The fact is, then, that the Postmaster General made adjustment on six routes, three routes of each claimant here, without weighing a pound of mail on any one of them. This was in the face of a contract calling for readjustment only on the basis of average daily weight to be ascertained by actual weighings of the mail carried for not less than ninety days. The violation of the contract is clear. And, to paraphrase the words of the court, Great Northern Railway Co. *vs.* United States, *supra*.

> "* * * the United States is liable to damages for its breach in the same manner and to the same extent as a private party, for which a suitable remedy was provided by law in the jurisdiction conferred upon the Court of Claims."

It is such remedy which claimants now ask. The Postmaster General having failed to pursue the method allowed by the contract for the readjustment of pay on a change of weight, his action was utterly void and the pay to which claimant was entitled was not changed during the contract period.

The Government was held bound to its contract for mail service in a similar case, in Chicago Northwestern Railway Co. *vs.* United States, 104 U. S., 683. Here there were four-year contracts running from 1875. In 1876 and 1878 Congress reduced the rates for railway mail transportation. The Postmaster General put the new rates in effect on the routes covered by the contract. In giving judgment for the claimant the court said:

> "It is argued, however, on the part of the Government, that the legal effect of what was done was to abrogate the old contracts and make new ones. It is claimed that the passage of the acts of Congress of July 12, 1876, c. 179, and of June 17, 1878, c. 259, and the notices from the Post Office Department that the reductions assumed to be contemplated by them would be insisted on; the fact that they were made in the adjustment of accounts, and that the railroad company notwithstanding its protest, continued to perform the service—had the effect to supersede the contracts of 1875, and substitute new ones in their stead, on the basis of the reduced compensation. Such, in substance, was the view taken by the Court of Claims.
>
> "In our opinion, that view cannot be maintained. The contracts of 1875 were for four years, and were expressly authorized by law. They were, therefore, valid, and binding on the United States as well as upon the railroad company. They contained, within

> themselves, a mode for lessening, or, if deemed best, for discontinuing entirely, the described service; and provided for a proportionate reduction of the stipulated compensation. In no other mode could the contract be changed, except by the mutual assent of the parties. Any change attempted by either, otherwise, would have been merely a breach of the agreement; and the United States would have been liable to damages for its breach, on the same principles and to the same extent as a private party, for which a suitable remedy was provided by law in the jurisdiction conferred upon the Court of Claims. In this respect, the relation between the parties was that of perfect equality in right."

So here there was a contract which provided means within itself for readjusting compensation, and that was the only mode in which it might be done. The Postmaster General, in attempting to readjust the pay by a different method, deliberately broke the contract. The United States is consequently liable for damages for the breach, which amount to the difference between the rate contracted for and the rate paid.

That the Postmaster General purported to act in accordance with an act of Congress makes no difference. So did he in the Chicago & Northwestern case, *supra*. In that case the court held the Postmaster General misinterpreted the statute, as we here hold. But even if he did not, the case would not be altered, for the United States had no more right to alter its obligation under a contract than any other party, and any impairment of the obligation of a contract by congressional act is unconstitutional. As the Supreme Court said in the Sinking Fund cases, 99 U. S., 700 (p. 718):

> "The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of

contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

Though three dissenting opinions were written in this case, each of them concurs in the proposition that Congress has no power to impair the obligation of a contract of the United States. Thus Justice Strong (at p. 731):

"In my opinion, the act of Congress of May 7, 1878, is plainly transgressive of legislative power. As was said by Mr. Hamilton in his celebrated communication to the Senate of Jan. 20, 1795, 'when a government enters into a contract with an individual it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate, unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it.' 3 Hamilton's Works, 518, 519. Opinions similar to this have often found expression in judicial decisions, even in those of this court. If this be sound doctrine, it is as much beyond the power

> of a legislature, under any pretence, to alter a contract into which the government has entered with a private individual, as it is for any other party to a contract to change its terms without the consent of the person contracting with him. As to its contract the government in all its departments had laid aside its sovereignty, and it stands on the same footing with private contractors."

Justice Bradley (at p. 746) says:

> "But if it were not, as it is, an actual or physical taking of property, if it were merely subversion of the contract and the substitution of another contract in its place, it would be a taking of property within the spirit of the constitutional provisions. A contract is property. To destroy it wholly or to destroy it partially is to take it; and to do this by arbitrary legislative action is to do it without due process of law."

And Justice Field (at p. 766):

> "In the second place, legislation impairing the obligation of contracts impinges upon the provision of the Constitution which declares that no one shall be deprived of his property without due process of law; and that means by law in its regular course of administration through the courts of justice. Contracts are property, and a large portion of the wealth of the country exists in that form. Whatever impairs their value diminishes, therefore, the property of the owner; and if that be effected by direct legislative action operating upon the contract, forbidding its enforcement or transfer, or otherwise restricting its use, the owner is as much deprived of his property without due process of law as if the contract were impounded, or the value it represents were in terms wholly or partially confiscated."

This unanimous concurrence of a divided bench on a certain doctrine has established it beyond question.

If, therefore, the act of the Postmaster General in readjusting compensation on a basis not authorized by the contract was in compliance with the act of Congress, the act is, to the extent that it directs such breach of contract, unconstitutional, and the right of claimants is not affected thereby.

It will no doubt be urged that the railroads by continuing to carry the mail after the readjustment named waived their rights. There is no foundation in law for such a conclusion. The claimant protested against the adjustment; it protested against the reduced pay; it cannot be said to have acquiesced in the action of the Postmaster General. The effectiveness of timely protest in the matter of mail compensation was established by this court in the case of Philadelphia & Baltimore Central R. R. Co. *vs.* United States, 13 C. C., 199. Here the road transported mail from 1873 to 1877 at a uniform rate. In December, 1875, it protested against the rate and method of compensation, but continued to furnish the service. At the end of the four-year period it sued for a different rate of pay for the whole term. The court gave it judgment for all time subsequent to the filing of the protest. This was not disturbed by the Supreme Court (103 U. S., 703).

In the Chicago & Northwestern Railway case, *supra*, the court said on the question of waiver (p. 686):

> "And the performance by the company of the service required by its contract notwithstanding the notice of the intended reduction of the compensation by the Postmaster General, cannot be construed as a waiver of its rights or an acquiescence in new proposals; and that whether it had protested against the erroneous construction of the law or not. For it had no option. It was bound by its contract to perform the service, and its performance was demanded. It was not in a position absolutely to refuse to carry the mails, for it was bound to carry them, if offered, on some terms, either prescribed by law or fixed by contract; and it

had the right to do so, without prejudice to its lawfu
claims, leaving the ultimate right to future and fin
decision."

It may be said that this reasoning applied to a land-gra
road only, which was obliged to carry the mail; but in the im
mediately following case of Chicago, Milwaukee & St. Pa
Railway Company, 104 U. S., 687, which was not a land
grant road, the court held no waiver of rights arose by th
continuance of performance, the rights of the parties bein
fixed by the contract.

It would indeed be a novel doctrine that when one part
offers to commit a breach of contract, the other party has n
choice but to acquiesce or to discontinue performance.
breach by one party may give the other the right to discon
tinue performance, but it cannot take away his right to pe
form as fully as he can and recover according to the terms o
the contract.

In concluding this branch of the case, we wish to distin
guish two cases which might at first glance seem authorit
for a contrary view. The earlier and more important, be
cause the second largely follows it, is Eastern Railroad Co
vs. United States, 129 U. S., 391. Here the railroad withou
express contract carried the mails, on a weighing in 187
and an order of the Postmaster General fixing compensatio
for four years. In 1876 and 1878 the rate of pay was re
duced by statute. The Postmaster General put the reduc
tions into effect during the four-year term. The road mad
no protest of any kind. At the end of the four-year term
it sued for the full compensation, which was refused. There
are here three distinctions from the present case.

1. There was no evidence of contract except in the orde
fixing compensation, which reserved the right to change
compensation.

2. The change was a change of rate and not a change o
method of adjustment.

3. "It does not appear that the company at any time before the commencement of the action made any protest against or objection to the readjustment made by the Postmaster General" (statement by court).

The case was decided practically on the waiver of rights by failure to protest.

In the present case the agreement of the carrier was evidenced not merely by its carrying of the mails after receiving the original order fixing compensation, but its obligation was clearly expressed by the agreement in the Distance Circular to carry the mail "on the conditions prescribed by law, etc." But this agreement, making an express instead of an implied contract and making all the then existing law part of the terms of the contract, was entirely absent from the Eastern Railroad case.

The breach of contract here alleged is not, as in the Eastern Railroad case, caused by a change in rate, but by a change in the basis of application of the rate. There is still some dispute whether the statute (Act of 1873) fixed absolute rates of pay, but there has never been any dispute that it fixed an absolute basis of readjustment.

In the Eastern Railroad case the deciding factor was apparently the absence of any protest against the change until suit was commenced. In the present case no claim is made that the claimants did not protest in every way available against the readjustment. No waiver can even be alleged to have been committed.

The recent case of Delaware, Lackawanna & Western Railroad Company *vs.* The United States follows the Eastern Railroad case. Without acquiescing in the decision of this case, we may distinguish it from the case at bar.

To begin with, the railroad's contract was on a different form of Distance Circular, by which the railroad made its agreement only "if authorized" to perform service. The terms of the order fixing compensation here enter into the

contract, as it authorizes the service and its reservation of power to change rates is, therefore, of broader effect than in the present case where the contract is complete before the order.

As in the Eastern Railroad case, this is a question of change of rate only. As we pointed out there, the question of whether the statute fixes absolute rates may be in dispute; the question whether it fixed a basis for readjustments is not.

But a more far-reaching distinction lies in the fact that the change in the Delaware, Lackawanna & Western case was prospective, the change in the present case retrospective. The law changing rate of compensation was passed March 2, 1907, and was made effective from July 1, 1907. In the present case the law under which the Postmaster General purported to act was passed August 24, 1912, made effective as to diversions occurring in April, 1912, and made effective as to compensation from July 1, 1912, although the weighing in purported compliance with it was not had until November, 1912, and the orders for readjusted compensation did not issue till February, 1913.

No case can be cited to the effect that any executive officer acting with or without legislative authority can invade an express contract entered into by the Government by violating a clear condition thereof. That is exactly what was done in the present case, and the claimant is entitled to recover as for any other breach of contract.

II.

If the new statute changed the contract it did so only as to future diversions.

In distinguishing the Delaware, Lackawanna & Western case, we have pointed out that the action of the Postmaster General was retroactive. To be sure the statute under which he purported to act is apparently retrospective. Approved August 24, 1912, it contains a proviso:

> "That readjustment made hereunder shall not take effect before July first, nineteen hundred and twelve, and shall be for diversions occurring after January first, nineteen hundred and twelve."

But even should the court find that the Postmaster General acted in accordance with the statute, and that as to its prospective operation the statute was valid under the claimant's contract, the claimant's right to recover would be unaffected, for any retroactive operation of the statute is an impairment of the claimant's contracts and unconstitutional.

The cases in which a change of rate during the contract term by statute has been sustained, to wit, the Eastern Railroad case and the Delaware, Lackawanna & Western case, *supra*, proceed in part upon the theory that there was a reservation in the contract of right to change such rates, either in the order fixing compensation or in the statute. That power having been exercised the carrier has no right to complain.

In the present case, claimant having agreed to perform service under "conditions prescribed by law," there is no reservation of right to change except within the law. Should it be argued, and we must be understood to concede the point only *in arguendo*, that the contract contemplated that change in the statute should consequently change the terms of the contract, the present case is unaffected. The terms of the contract remained the same until August 24, 1912. The rights of the parties as to any act under the contract effected before that time were fixed by the contract then existing. Under a contract a party must be able to know certainly the results of performance, or deviation therefrom, or any act done under the contract. The results must be fixed by the contract at the time of the act.

So, in the present case, the Missouri, Kansas & Texas Railway knew when it discontinued its fast train that the Postmaster General had a right to divert the mails from that

route. It knew that subsequent to the diversion he had a right to reweigh the mails on any route affected by the diversion for not less than ninety working days and to establish new rates of pay on the basis of the new average daily weight. The Postmaster General knew he had the same rights. That is why a contract was made, so both parties might know the consequences of contemplated acts.

Even though, then, the contract was changed on August 24, 1912, it could not change the results of any act performed before that date. So far as it attempts to do so it violates the contract existing when the act was performed and is therefore invalid and unconstitutional under the authorities we have cited above.

The court is not now called on to decide whether a readjustment in accordance with the terms of the act might be made for a diversion occurring AFTER August 24, 1912, when the act was approved. The diversion here occurred BEFORE that date, and there is no question that under the contract then existing a readjustment on a weighing of all the mails on the route for ninety days was the only one legally possible.

III.

The act of August 24, 1912, only authorized the Postmaster General to act when the diverted mails equalled at least 10 per centum of the average daily weight on any of the routes affected, and it was error to sustain his exercise of power in weighing mails in November, 1912, to ascertain weights diverted in January, 1912.

Giving full effect to the act of August 24, 1912, as applicable to this contract, it must nevertheless be clear that the Postmaster General could not exercise an arbitrary power under its terms, but can and should be required to act in accordance with the plain provisions of the law.

Congress said when mails are diverted a readjustment of pay might be made provided the weight of the *diverted* mails equalled at least 10 per centum of the daily average weight carried.

Every report of the Postmaster General states a normal average increase in the weight of mail of from 7 to 12 per centum and it is manifest on its face that the mails carried in November, 1912, were considerably heavier than in January of that year. When, therefore, the Postmaster General weighed the diverted mails in November, 1912, he did not and could not certify that they were more than 10 per centum of the daily average weight in January when the diversion was actually made. By the method adopted the Postmaster General not only weighed a large growth of diverted mails, but applied the result to a daily average ascertained nearly three years prior, or in February, 1910. To merely state the proceeding is enough to demonstrate its unfairness and its disregard of the plain purpose of Congress as expressed in the act.

IV.

The act does not authorize a weighing of diverted mails only.

There is a serious question which we consider it our duty to present to the court, whether the act of August 24, 1912, contemplated a weighing of diverted mails only.

The provision in question reads:

> "*Provided*, That no readjustment shall be made unless the diverted mails equal at least ten per centum of the average daily weight on any of the routes affected; *provided, further*, that readjustment made hereunder shall not take effect before July first, nineteen hundred and twelve, and shall be for diversions occurring after January first, nineteen hundred and twelve."

A very patent ambiguity at once appears—that is, the words "such mails" refer to the "mails" which have been weighed "for the purpose of readjusting their compensation on a railroad route" or "mails" which "are diverted therefrom or thereto."

An ambiguity thus appearing, we are justified in applying the rules of construction, one of which is that repeal by implication is not favored. As the Supreme Court says, in Frost *vs.* Weine, 157 U. S., 46:

> "It is well settled that repeals by implication are not favored. And when two statutes cover in whole or in part the same matter and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both."

And again, in Wilmot *vs.* Mudge, 103 U. S., 217:

> "The rules of construing statutes in like cases with the present are so well understood as to need no citation of authorities.
>
> "They are first, that effect shall be given to all the words of a statute, where this is possible without a conflict; and, second, that as regards statutes in *pari materia* of different dates, the last shall repeal the first only when there are express terms of repeal, or where the implication of repeal is a necessary one. When repeal by implication is relied on it must be impossible for both provisions under consideration to stand, because one necessarily destroys the other. If both can stand by any reasonable construction, that construction must be adopted."

In the present case the provision repeals to some extent the provision of the act of 1905 that readjustment is in all cases to be had on the basis of a reweighing for not less than ninety days.

> "That hereafter before making the readjustment of pay for transportation of mails on railroad routes,

> the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days, not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

Repeal by implication not being favored, the repeal must be limited to the parts absolutely irreconcilable—that is to say, the requirement of a weighing period of not less than ninety days.

It is a reasonable construction to the present provision to hold it to mean that in case of diversion the Postmaster General need not weigh the mails on the routes affected for ninety days, but only for such number of days "as he may determine." There is no express or necessarily implied repeal of the provision of the Act of 1905 that readjustment shall be on the basis of the average daily weight, to be ascertained in every case by the actual weighing of the mails on the route.

This leads us to the application of another rule of construction mentioned above, namely, that in a series of statutes in *pari materia* similar words will be construed to have a similar meaning.

Wilmot *vs.* Mudge, *supra.*

An early expression of the rule is in United States *vs.* Freeman, 3 Howard, 556, at page 564:

> "The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration, in construing any one of them, and it is an established rule of law, that all acts, in *pari materia*, are to be taken together as if they were one law. * * * If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute. * * * and if it can be gathered

> from a subsequent statute in *pari materia* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute."

Now the provision in the case at bar provides no readjustment may be made "unless the diverted mails equal at least 10 per centum of the average daily weight on any of the routes affected."

The Postmaster General surely cannot ascertain whether the diverted mails equal 10 per centum of the average daily weight unless he knows what the average daily weight is. The words "average daily weight" must here mean what they have been stated in former statutes to mean, namely, the average daily weight "ascertained by the actual weighing of the mails." It was impossible, then, without weighing all the mails on the route, for the Postmaster General to know whether the diverted mails equalled 10 per cent thereof.

The Postmaster General, moreover, in stating the readjusted compensation, stated it as based on a "new average daily weight" (Report P. O. Dept.). As no average daily weight can be fixed except by actual weighing of the mails on the route, there was no new average daily weight to use as a basis for readjustment.

It is unreasonable to suppose that Congress intended to measure the percentage of mail diverted in 1912 by an average daily weight found in 1910. It is well known that the weight of mail carried on a route changes during the four-year term usually by a gradual increase. To find, then, that the diverted mails in 1912 equalled 10 per cent of the weight found in 1910 on a route is no indication that the diverted mails equalled 10 per cent of the mail carried in 1912.

The Postmaster General's construction of the law as requiring weighing of diverted mails only leads to the absurd result that after a diversion a route's pay might be reduced even

though it was still carrying a greater weight of mail than the weight carried in 1910 upon which the adjustment of compensation was based.

Suppose a route to have carried 10,000 pounds daily average mail in 1910, on which its compensation for the four-year period was based.

If the weight of mails increased at the rate of 8 per cent a year, not an abnormal increase, it would in 1912 have been carrying 11,600 pounds. If subsequent to the diversion it was found that the mails diverted weighed 1,500 pounds, this would exceed 10 per cent of the average daily weight in 1910 as well as in 1912. The pay would be then readjusted on a basis of 8,500 pounds, although the road was actually carrying in 1912 10,000 pounds, or more than it was being paid for. We cannot credit Congress with having contemplated such an injustice. If all the mails on the route had been weighed, the results would have shown no basis for reduction and the carrier's pay would have remained the same, a condition of which it would not complain.

A further injustice in the Postmaster General's method was to weigh in November and December, 1912, mails diverted in January and April. Between the diversion in April and the weighing in November seven months elapsed, during which time the diverted mails by a normal increase of 8 per cent annually (for example) would have increased over 4 per cent. It was obviously impossible for the Postmaster General to ascertain by weighing certain mails in November whether like mails in April equalled 10 per cent of the mails carried on the routes from or to which diversion was made in 1910 or in 1912.

This is what he has tried to do. The statute by its terms forbids readjustment unless the diverted mails equal 10 per cent of the average daily weight. The weight of diverted mails could only be ascertained immediately after the diversion; any number of extraordinary circumstances besides normal increase might intervene to make a very different

weight of mail seven months later between the same points.

It was, therefore, impossible for the Postmaster General under the method he here pursued to fulfill even his own construction of the statute.

The Postmaster General's construction of the statute leads to injustice and absurdities. His action under it could not possibly result in a compliance with its terms. The conclusion is inevitable that Congress intended by the provision to allow the Postmaster General to make readjustments following a diversion on a weighing of all the mails on the routes affected for any period he might determine, subject to the limitation that he might make such readjustment only when the diverted mails equalled 10 per cent of the total mails then carried on the route.

Of course if the Postmaster General misinterpreted the law and his action did not comply with it, the rights of the carriers were not affected. As the Supreme Court said in the Chicago & Northwestern case, *supra:*

> "Of course if it was not the intention of the acts of Congress referred to to affect the contracts of the company, the erroneous interpretation of them by the Postmaster General and his action under it cannot give to them any different effect, for the rights of the parties depend on the law itself."

V.

No readjustment could be effective till the order was issued.

If the court should hold that the railroads had no contract for carrying the mail, or that they had a contract terminable by the Postmaster General at any time by a new offer of compensation which automatically put the railroad on its election either to discontinue the service or to accept the new terms, however unconscionable they might be, it may be that the railroads cannot here recover in full. We

can conceive of no other view of their relation to the Post Office Department which could preclude their full recovery in the present case.

In such a view, however, the railroad is not put upon its election until the new offer of compensation is made. It cannot know whether the proffered rate is advantageous or not until it is made.

In the Delaware, Lackawanna & Western case, *supra*, the law changing rates was passed March 2, 1907, to be effective, July 1, 1907. The orders readjusting pay on the basis of the new rates were issued September 12, 1907. Though by the terms of the law the Postmaster General was to "readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven," the Court of Claims there held:

> "It appears, however, that the orders and notices under the act of 1907 were issued on September 12, 1907, at the rates stated in the readjusting orders and notices. We think it was entitled to receive the rates fixed by the 1905 orders until they were changed by the Postmaster General as directed by the act of 1907, and thereafter to be paid under the new rates. The difference between the two rates up to September 12 was $698.39 and for this difference plaintiff should have judgment."

In the present case the equities demand even more strongly that the readjustment, if valid, should not be effective till the issuance of the orders. In the Delaware, Lackawanna & Western case there was a mere flat percentage reduction. There was no reweighing and no new basis of computation. The claimant was aware from the moment of the passage of the act what the new rates would be if applied to its routes; it might, therefore, have exercised its option to refuse service on July 1st.

In the present case there was no change of rate as such, but a weighing of some mails never definitely identified,

none of it taking place on claimant's lines. Claimants had no way of knowing or even estimating prior to the issuance of the orders what the rates would be. The orders did not issue until February 21, 1913, on five routes and on one route not until March 6, 1913. The roads were paid at the new rates from July 1, 1912. The difference between the old and new rates for that period is, on the Missouri, Kansas and Texas, $3,025.41, and on the Missouri, Kansas and Texas of Texas, $2,899.69.

Conclusion.

The is no doubt here that claimants should recover. The only question is as to the amount.

If the court believes the claimants had four-year contracts based on existing law when the contracts were made, claimants must recover the full amount.

If the court believes the claimants had contracts based on the statute and existing unchanged until the statute was changed, the claimants must recover in full.

If the court believes the statute (act of Aug. 24, 1912) did not authorize readjustments upon weighing of diverted mails only, the claimants must recover in full.

If the court believes the Postmaser General could not ascertain in November whether mails diverted in January or April equalled 10 per cent of the mails carried in April, the claimant must recover in full.

If the court believes the claimants had no contractual rights except to accept an offer of new compensation or refuse to carry the mails, the claimants must nevertheless recover the difference between the rates till the orders of readjustment were issued.

Respectfully submitted,

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